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16 **UNITED STATES DISTRICT COURT**
17 **CENTRAL DISTRICT OF CALIFORNIA –EASTERN DIVISION**

18 ALADDIN ZACKARIA, individually,
19 and on behalf of other members of the
20 general public similarly situated, and on
21 behalf of aggrieved employees pursuant
22 to the Private Attorneys General Act
23 (“PAGA”);

21 Plaintiff,

22 vs.

23 WAL-MART STORES, INC., a
24 Delaware corporation; and DOES 1
25 through 100, inclusive,

25 Defendants.

Case No. EDCV11-01418 VAP
(DTBx)

Honorable Virginia A. Phillips

CLASS ACTION

**PLAINTIFF’S NOTICE OF
MOTION AND MOTION TO
REMAND; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: November 7, 2011
Time: 2:00 p.m.
Place: Courtroom 2

Complaint Filed: August 3, 2011

TO DEFENDANT AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 7, 2011 at 2:00 p.m. or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable Virginia A. Phillips in the United States Courthouse, located at 3470 Twelfth Street, Riverside, California, 92501, Plaintiff Aladdin Zackaria ("Plaintiff") will and hereby does move for an order remanding this action to the San Bernardino County Superior Court.

Plaintiff moves for remand under 28 U.S.C. § 1447 on the ground that this Court lacks removal jurisdiction over this case. Defendant Wal-Mart Stores, Inc. improvidently removed this action from state court by failing to meet its burden of proof to show that the amount in controversy exceeds the sum of \$5,000,000. Furthermore, this Court should not exercise jurisdiction over the Private Attorneys General Act ("PAGA") claim because the federal courts lack jurisdiction over a PAGA claimant.

Plaintiff's motion is based on this Notice; the Memorandum of Points and Authorities; all other pleadings and papers on file in this action; and any oral argument or other matter that may be considered by this Court.

This motion is made following the conference to counsel pursuant to Local Rule 7-3, which took place on September 13, 2011.

DATED: September 30, 2011

LAWYERS for JUSTICE, PC

By: 

Jill J. Parker

Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a California putative class action brought by Plaintiff Aladdin Zackaria ("Plaintiff"), individually; on behalf of members of the general public similarly situated; and on behalf of aggrieved employees pursuant to the Private Attorneys General Act ("PAGA") against Defendant Wal-Mart Stores, Inc. ("Defendant"). Plaintiff alleges that Defendant failed to pay him and the putative class members minimum wages and otherwise failed to treat them in the manner required by California wage-and-hour law.

Defendant removed this action based upon the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2) ("CAFA") jurisdiction. Plaintiff seeks an order to remand this case to state court because Defendant failed to prove that the federal jurisdictional amount in controversy of \$5,000,000 is met. Defendant failed to provide even one single employment record to support its amount in controversy calculations. Indeed, Defendant's evidence submitted in support of its Notice of Removal consists solely of a five sentence declaration from one of its Senior Directors testifying that the size of the putative class is approximately 400 individuals. This paltry offering is categorically insufficient for Defendant to meet its heavy burden to prove the amount in controversy by a preponderance of the evidence. Moreover, this Court should not exercise jurisdiction over Plaintiff's PAGA claim because federal courts lack jurisdiction over a PAGA claimant.

"If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). Therefore, pursuant to 28 U.S.C. § 1447(c), this Court must remand this case to the San Bernardino County Superior Court, where it was originally filed and where it rightfully belongs.

II. STATEMENT OF FACTS

On August 3, 2011, Plaintiff filed this putative class action against Defendant in the San Bernardino County Superior Court. (*See* Complaint attached as “Exhibit A” to Defendant’s Notice of Removal.) The Complaint alleges three causes of action for violations of California Labor Code §§ 510, 1194, and 1198; California Labor Code § 2698; and California Business & Professions Code § 17200. (*See generally* Complaint.) In particular, the Complaint alleges failure to pay overtime; provide meal and rest periods; pay minimum wages; timely pay wages; provide compliant wage statements; and keep complete and accurate payroll records. (*See generally* Complaint.) The Complaint defines the putative class as follows: “All current and former California-based salaried ‘Asset Protection Coordinators,’ or persons who held similar job titles and/or performed similar job duties, who worked for Defendants within the State of California from [August 3, 2007] to final judgment.” (Complaint, 3:8-12.)

On September 7, 2011, Defendant filed a Notice of Removal under 28 U.S.C. § 1332(d)(2). Relying solely on speculative and inflated assumptions, Defendant claims that the requisite amount in controversy of \$5,000,000, excluding interest and costs, is met under § 1332(d)(2). However, Defendant’s conjectural and overstated calculations do not sustain its burden of proof to show that the amount in controversy is met, under either the legal certainty standard or the preponderance of the evidence standard. The Ninth Circuit clearly requires summary judgment type evidence to support all assertions regarding the amount in controversy and provides that assertions that include speculation or conjecture will not suffice. Here, Defendant pleads alleged statutory penalties and an alleged number of class members in its Notice of Removal with providing scant admissible evidence. Moreover, Defendant makes no attempt whatsoever to calculate amounts in controversy for unpaid wages, overtime, and meal and rest breaks, and

1 for record keeping violations. Thus, Defendant fails to carry its burden to establish
2 that the amount in controversy exceeds \$5,000,000 under either standard.

3 Assuming, *arguendo*, that Defendant could meet its burden to prove that
4 removal jurisdiction is proper, which it has not, this court still should not exercise
5 jurisdiction over the PAGA claim. Plaintiff is acting as the alter ego of the State of
6 California to collect civil penalties for the state. As such, this Court no longer has
7 jurisdiction under the CAFA and under abstention principles.

8 On September 13, 2011, Plaintiff sent counsel for Defendant a meet and
9 confer letter explaining why Defendant's removal was improper. (Declaration of
10 Edwin Aiwazian, ¶ 5.) On September 20, 2011, counsel for Defendant responded
11 to that letter with a letter indicating Defendant's refusal to withdraw its Notice of
12 Removal and stipulate to remanding this action back to the San Bernardino
13 Superior Court. (Declaration of Edwin Aiwazian, ¶ 6.) As such, this Motion to
14 Remand was necessary. (Declaration of Edwin Aiwazian, ¶ 7.)

15 There are serious doubts about the propriety of Defendant's removal. This
16 Court cannot base its subject-matter jurisdiction on Defendant's speculative and
17 unsubstantiated assumptions about the amount in controversy, and should not
18 exercise jurisdiction over the PAGA claim. Thus, this case must be remanded to
19 state court.

20 **III. STANDARD OF LAW**

21 **A. The Ninth Circuit Applies A Strong Presumption Against** 22 **Removal.**

23 Courts in the Ninth Circuit strictly construe removal statutes against removal
24 jurisdiction. *See Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (citing
25 *Boggs v. Lewis*, 863 F.2d 662, 663 (9th Cir. 1988)); *Takeda v. Northwestern Nat'l*
26 *Life Ins. Co.*, 765 F.2d 815, 818 (9th Cir. 1985). Indeed, "[f]ederal jurisdiction
27 must be rejected if there is any doubt as to the right of removal in the first
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instance.” *Gaus*, 980 F.2d at 566; *see also Bartnikowski v. NVR, Inc.*, 2008 WESTLAW 2512839 (M.D.N.C. 2008), *aff’d*, 307 Fed.Appx. 730 (4th Cir. 2009) (“If the propriety of federal jurisdiction is doubtful, a remand is necessary”). “The ‘strong presumption’ against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper.” *Guas*, 980 F.2d at 566. This applies equally to removal under CAFA jurisdiction. *See Sneddon v. Hotwire,, Inc.*, 2005 U.S. Dist. LEXIS 13257, *5 (N.D. Cal. 2005). The Ninth Circuit has held, “[U]nder CAFA the burden of establishing removal jurisdiction remains, as, before, on the proponent of federal jurisdiction.” *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 685 (9th Cir. 2006).

B. Removing Defendants Bear The Burden To Prove That The Amount In Controversy Exceeds The Jurisdictional Amount.

“[W]here a plaintiff’s state court complaint does not specify a particular amount of damages, the removing defendant bears the burden of establishing, by a preponderance of the evidence, that the amount in controversy exceeds [the jurisdictional amount]. Under this burden, the defendant must provide evidence establishing that it is ‘more likely than not’ that the amount in controversy exceeds that amount.” *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996). Because Plaintiff’s Complaint specifies only that the amount in controversy for Plaintiff individually is less than \$75,000 and that the total recovery for the putative class exceeds \$25,000, the preponderance of the evidence standard applies. (*See generally* Complaint); *see also Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 699 (9th Cir. 2007) (“[W]here it is unclear or ambiguous from the face of a state-court complaint whether the requisite amount in controversy is pled. . . . we apply the preponderance of the evidence standard.”) CAFA jurisdiction requires that the aggregate amount in controversy exceed \$5,000,000, exclusive of interest and costs. 28 U.S.C. § 1332(d)(2). In order to establish removal

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jurisdiction pursuant to CAFA, Defendant bears the burden to prove by a preponderance of the evidence that the amount in controversy exceeds \$5,000,000.

C. Only The Complaint And "Summary Judgment Type Evidence" May Be Used To Prove The Amount In Controversy.

Defendant, in attempting to satisfy its burden, must do so with nothing less than competent evidence. *See Gaus*, 980 F.2d at 567 (jurisdictional facts must be established with "competent proof"); *Sanchez*, 102 F.3d at 404 ("[T]he defendant bears the burden of actually proving the facts to support jurisdiction, including the jurisdictional amount."). Indeed, the strict "presumption [against removal] can only be overcome if the [removing] defendant can prove . . . – *with summary judgment type evidence* – that the factual circumstances of the case are such that it is more likely than not that the [amount in controversy] requirement is satisfied. (citations omitted)." *Mix v. Allstate Ins. Co.*, No. CV 00-835 RCTX, 2000 WL 1449880 at *1 (C.D. Cal. 2000) (emphasis added); *Korn v. Polo Ralph Lauren Corp.*, 536 F. Supp. 2d 1199, 1205 (E.D. Cal. 2008) ("In addition to the contents of the removal petition, the court considers 'summary-judgment-type evidence relevant to the amount in controversy at the time of removal,' such as affidavits or declarations."), citing *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1117 (9th Cir. 2004). Thus, "a court 'cannot base [its] jurisdiction on a [d]efendant's speculation and conjecture.'" *Korn*, 536 F. Supp. 2d at 1205, citing *Lowdermilk v. United State Bank Nat'l Ass'n*, 479 F.3d 994, 1002 (9th Cir. 2007). Here, Defendant must provide competent evidence that the requisite amount in controversy is met in order to sustain its burden of proof.

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1 IV. ARGUMENT

2 A. Defendant Fails To Establish CAFA Jurisdiction Because
3 Defendant Cannot Meet Its Burden To Prove That The Requisite
4 Amount In Controversy Is Met.

5 As discussed above, Defendant must proffer competent evidence that the
6 amount in controversy exceeds \$5,000,000 in order to meet its burden of proof.
7 *See Gaus*, 980 F.2d at 567. It is beyond dispute that this court “cannot base [it]s
8 jurisdiction on Defendant’s speculation and conjecture.” *Lowdermilk*, 479 F.3d at
9 1002. Yet, that is precisely what Defendant requests this Court to as Defendant
10 fails to present a single piece of evidence in the form of admissible testimony
11 regarding putative class members’ salaries, number of workweeks worked, or
12 record keeping practices. Defendant’s failure to provide competent evidence is
13 particularly inexcusable since Defendant, as the employer, has *ready* access to all
14 the facts, records, and information necessary to make a showing on the issues. In
15 addition, Defendant’s assumptions are not supported by the allegations in the
16 Complaint. Thus, Defendant proffers inflated and speculative conclusions, which
17 cannot suffice to meet Defendant’s burden of proof.

18 Defendant’s amount in controversy calculations for statutory penalties
19 resemble the flawed approach taken by the defendant in *Dupre v. GM*, 2010 U.S.
20 Dist. LEXIS 95049 (C.D. Cal. 2010). In *Dupre*, the Court held that the defendant
21 failed to meet its burden to prove by a preponderance of the evidence that the
22 amount in controversy for CAFA jurisdiction was met. *Id.* There, the defendant
23 made various assumptions regarding the amount of putative class members, the
24 number of days each employee worked per year, the number of withheld wage
25 statements, and the number of missed meal and rest breaks. *Id.* at *11. However,
26 the defendant did not provide competent evidence of the facts supporting such
27 assumptions. Thus, the Court reasoned, “The calculation of penalties depends

1 heavily on the number of days Defendant withheld wages or wage statements
 2 Without evidence supporting specific numbers for these variables, the Court cannot
 3 accurately calculate the amount of civil penalties to which each class member
 4 would be entitled.” *Id.* Accordingly, the Court remanded the case to the San
 5 Bernardino County Superior Court. *Id.* at *12; *see also Martinez v. Morgan*
 6 *Stanley & Co.*, 2010 U.S. Dist. LEXIS 80797, *12-13 (S.D. Cal. 2010) (finding
 7 that the defendant erroneously assumed that the plaintiff worked four hours of
 8 overtime each day based on plaintiff’s general approximations that she worked
 9 “approximately 12 hours per weekday [and] approximately 60 hours per week,”
 10 and “consistently worked in excess of eight hours in a day and/or excess of forty
 11 hours in a week.”)

12 As in *Dupre*, Defendant alleges amounts in controversy for statutory
 13 penalties which are speculative and unsupported by the allegations in the
 14 Complaint. While Plaintiff’s Complaint simply states that the putative class
 15 members are entitled to statutory penalties “for the initial violation” and “for each
 16 subsequent violation,” Defendant therefrom makes several overstated suppositions.
 17 (Complaint, 15:27-16:16). For example, Defendant assumes, without providing
 18 any supporting evidence, that each putative class member worked for the entire
 19 putative class period of four years. In addition, Defendant supposes, without
 20 providing any supporting evidence, that each putative class member experienced a
 21 violation for ten pay periods. Even if that were the case (which Defendant has not
 22 demonstrated that it is more likely than not to be the case), Defendant admits that
 23 the amount in controversy for statutory penalties would only be \$1,900,000. This
 24 is far below the \$5,000,000 amount in controversy requirement. Then, Defendant
 25 presumes, again without any supporting evidence, that each putative class member
 26 experienced a violation for twenty-six pay periods. Defendant completely fails to
 27 provide any evidence of payroll practices or other admissible evidence to support
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1 such conclusions. Such an egregious calculation is speculation and conjecture,
2 which cannot form the basis of this Court's jurisdiction. As in *Dupre*, this Court
3 must remand this action to state court because Defendant fails to meet its burden of
4 proof.

5 Furthermore, Defendant bases all of its amount in controversy calculations
6 on an alleged number of qualifying putative class members. However,
7 Defendant's understanding of the putative class does not adequately resemble the
8 Complaint's putative class definition. The Declaration of Ronald Lance avers that
9 there are "approximately 400 people who have held the position of Asset
10 Protection Coordinator ("APC") at Wal-Mart stores in California" during the
11 putative class period. (Declaration of Ronald Lance ("Lance Decl.") ¶ 3).
12 However, such approximation does not take into account that the Complaint
13 expressly limits the class to "California-based" individuals, meaning individuals
14 who are currently based in California. Moreover, Defendant's approximation
15 completely fails to distinguish between "Asset Protection Coordinators" who were
16 paid on an hourly basis as opposed to a salary basis, as the putative class definition
17 only encompasses those "Asset Protection Coordinators" who were paid on a
18 salary basis. Thus, Defendant failed to provide competent evidence establishing
19 the size of the putative class, which is the foundation for its amount in controversy
20 calculations. As such, all of Defendant's calculations necessarily fail to establish
21 that the amount in controversy more likely than not exceeds \$5,000,000.

22 Although Defendant cites *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1210-
23 11 (11th Cir. 2006) to contend that the preponderance of the evidence standard
24 applies, Defendant should be familiar with the Court's decision in *Lowery*. (Notice
25 of Removal, 5:11-16). In *Lowery*, "[t]he defendants' argument [was] premised on
26 the observation that, to reach the jurisdictional threshold, each of the roughly 400
27 plaintiffs need only recover, on average, \$12,500." *Id.* at 1220. The Court
28

1 expressly found this argument insufficient to meet the defendant's burden to prove
2 by a preponderance of the evidence that the amount in controversy for CAFA
3 jurisdiction was met. *Id.* at 1221. The Court reasoned:

4 It may be true, in light of the nature of the claims the plaintiffs assert
5 . . . that a recovery of \$12,500 per plaintiff appears to be a relatively
6 low hurdle. Nevertheless, we fail to see how we can justify a
7 conclusion that the per-plaintiff recovery will exceed even so low a
8 total. To reach such a conclusion, we would necessarily need to
9 engage in impermissible speculation - evaluating without the benefit
10 of any evidence the value of individual claims.

11 *Id.* at 1220. Furthermore, the Court stated:

12 [W]e are at a loss as to how to apply the preponderance burden
13 meaningfully. We have no evidence before us by which to make any
14 informed assessment of the amount in controversy. All we have are
15 the representations relating to jurisdiction in the notice of removal and
16 the allegations of the plaintiffs' third amended complaint. As such,
17 any attempt to engage in a preponderance of the evidence assessment
18 at this juncture would necessarily amount to unabashed guesswork,
19 and such speculation is frowned upon.

20 *Id.* at 1210-11. Accordingly, the Court affirmed the district court's remand
21 of the case to state court. *Id.* at 1221.

22 As in *Lowery*, for the alleged amount in controversy for unpaid wages,
23 overtime, and meal and rest breaks, and record keeping violations, Defendant only
24 contends, "[E]ach of the 400 existing putative class members need only seek
25 \$12,500 in such collective damages to reach the \$5,000,000 amount in
26 controversy." (Notice of Removal, 6:10-11). Other than the Declaration of Ronald
27 Lance, which estimates there are 400 putative class members, Defendant provides
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no other calculations or admissible whatsoever to support this contention. As in *Lowery*, this Court cannot make an informed amount in controversy determination from this bare allegation. Thus, like in *Lowery*, Defendant has not met its burden of proof, and this Court must remand this case to state court.

Ultimately, Defendant presents an entirely conjectural argument. Federal jurisdiction pursuant to 28 U.S.C. § 1332(d)(2) cannot be triggered in such a cavalier manner, and Defendant should be familiar with the burden it carries to invoke CAFA jurisdiction. Recently, in a similar employment-related case entitled *Campbell v. Vitran Express, Inc.* 2010 U.S. Dist. LEXIS 132071, *12 (C.D. Cal. 2010), the Honorable R. Gary Klausner, United States District Judge in this District, remanded the case back to the Los Angeles County Superior Court. Judge Klausner ruled: “Defendant has left the Court to speculate as to the amount of unpaid wages owed. Such uncertainty cannot overcome the heavy burden of establishing removal, as ‘we cannot base our jurisdiction on Defendant’s speculation and conjecture.’” *Campbell*, 2010 U.S. Dist. LEXIS 132071 at *11-12.

Because Defendant has presented scant credible evidence to support its assumptions, it fails to provide competent evidence to show that the requisite amount in controversy is met. Thus, this Court must remand this case to state court.

B. The Court Should Not Exercise Jurisdiction Over The PAGA Claim Because Plaintiffs Are Acting As The Private Attorneys General Of The State Of California In An Action To Collect Civil Penalties For The State.

i. Plaintiff pursues this action as a representative action under PAGA

The court may order remand for lack of subject matter jurisdiction and “for any defect other than lack of subject matter jurisdiction,” such as defects in

1 removal procedure. 28 U.S.C. § 1447(c). Plaintiff pursues this action as a
 2 representative action under PAGA. The California Supreme Court has held that a
 3 plaintiff is entitled to pursue a PAGA claim on a representative basis without
 4 complying with class requirements or obtaining class certification. *Arias v. The*
 5 *Superior Court of San Joaquin County, et al.*, 46 Cal. 4th 969 (2009); *see also* Cal.
 6 Lab. Code § 2698 et seq.

7 Furthermore, the court may also remand based on abstention principles.
 8 “[F]ederal courts have the power to dismiss or remand cases based on abstention
 9 principles only where the relief being sought is equitable or otherwise
 10 discretionary.” *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 731 (U.S. 1996).
 11 A PAGA claim is a discretionary action. *See* Cal. Lab. Code § 2699(e)(1) (“For
 12 purposes of this part, whenever the Labor and Workforce Development Agency, or
 13 any of its departments, divisions, commissions, boards, agencies, or employees,
 14 has discretion to assess a civil penalty, a court is authorized to exercise the same
 15 discretion, subject to the same limitations and conditions, to assess a civil
 16 penalty.”). As such, this Court does not have jurisdiction under the CAFA and
 17 under abstention principles.

18 **ii. A PAGA claimant is an alter ego or agent of the State of**
 19 **California**

20 CAFA provides for removal in a class action where any defendant is a
 21 citizen of another state than a plaintiff. 28 U.S.C. § 1332(d)(2). This law has
 22 changed the rule of complete diversity regarding certain class actions.
 23 Nonetheless, under any rule, a state or the alter ego of the state is not a citizen for
 24 purposes of diversity. *See, e.g., Am. Vantage Cos. v. Table Mt. Rancheria*, 292
 25 F.3d 1091 (9th Cir. 2002) (“The states – themselves domestic sovereigns – ‘cannot
 26 sue or be sued in diversity’ [citation] because they are not citizens of any state.’)

27 Removal jurisdiction raises significant federalism concerns, and the courts
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1 “must strictly construe removal jurisdiction.” *Lowdermilk*, 479 F.3d at 998. If
2 federal jurisdiction is doubtful, then remand is necessary. *Gaus*, 980 F.2d at 566.
3 California Labor Code § 2698 provides, “This part shall be known and may be
4 cited as the Labor Code Private Attorneys General Act of 2004.” Stats. 2003 ch.
5 906(d) provides:

6 It is therefore in the public interest to provide that civil penalties for
7 violations of the Labor Code may also be assessed and collected by
8 aggrieved employees acting as private attorneys general, while also
9 ensuring that state labor law enforcement agencies' enforcement
10 actions have primacy over any private enforcement efforts undertaken
11 pursuant to this act.

12 Thus, under PAGA an “aggrieved employee” may bring a civil action
13 personally and on behalf of other current or former employees to recover civil
14 penalties for Labor Code violations. Cal. Lab. Code § 2699(a). Seventy-five
15 percent of the civil penalties goes to the Labor and Workforce Development
16 Agency, with the remaining twenty-five percent going to “aggrieved employees.”
17 Cal. Lab. Code § 2699(i). The Courts have defined a PAGA action as follows:

18 [A]n enforcement action, with the aggrieved employee acting as a
19 private attorney general to collect penalties from employers who
20 violate labor laws. Such an action is fundamentally a law enforcement
21 action designed to protect the public and penalize the employer for
22 past illegal conduct. Restitution is not the primary object of a PAGA
23 action, as it is in most class actions.

24 *Franco v. Athens Disposal Co., Inc.*, 171 Cal. App. 4th 1277, 1300 (2009).

25 Under California law, “in a ‘representative action,’ the plaintiff seeks [to]
26 recover on behalf of other person[s].” *Arias*, 46 Cal. 4th at 5 fn.2. “The final bill
27 analysis for the 2003 legislation states: ‘This bill allows employees to sue their
28

1 employers for civil penalties for employment law violations. This bill is intended
2 to augment the enforcement abilities of the Labor Commissioner by creating an
3 alternative ‘private attorney general’ system for labor law enforcement. . . .”
4 *Franco*, 171 Cal. App. 4th at 1300.

5 “An employee plaintiff suing . . . under [PAGA] of 2004, does so as the
6 proxy or agent of the state’s labor law enforcement agencies. . . . In a lawsuit
7 brought under the act, the employee plaintiff represents the same legal right and
8 interest as state labor law enforcement agencies – namely, recovery of civil
9 penalties that otherwise would have been assessed and collected by the Labor
10 Workforce Development Agency.” *Arias*, 46 Cal. 4th at 986. In *Arias*, the
11 California Supreme Court precisely defined the effect of a PAGA claim as it
12 relates to the state and the represented employees. That is:

13 The act authorizes a representative action only for the purpose of
14 seeking statutory penalties for Labor Code violations (Lab. Code, §
15 2699, subds. (a), (g)), and an action to recover civil penalties “is
16 fundamentally a law enforcement action designed to protect the public
17 and not to benefit private parties.

18 *Id.*

19 In enacting the PAGA, the Legislature intended employees to represent the
20 State of California, as well as other employees, in enforcing the Labor Code and
21 collecting civil penalties that only the Labor Commission previously could collect.
22 Thus, as the California Supreme Court noted, a PAGA claimant is the alter ego of
23 the State, just as the Labor Commissioner would be the State's alter ego if the
24 Commissioner brought suit to collect the civil penalties.

25 **iii. Federal courts lack jurisdiction over a PAGA claimant**

26 At least two District Courts have found that they lack jurisdiction over a
27 PAGA claimant. In *Sample v. Big Lots Stores, Inc.*, 2010 U.S. LEXIS 131130
28

(N.D. Cal. 2010), the Honorable Sandra Brown Armstrong remanded a PAGA action on the ground that PAGA actions are not class actions subject to removal under CAFA. “A suit brought under PAGA does not implicate the concerns underlying the enactment of CAFA. By definition, Plaintiff’s claim is limited to Labor Code violations involving employees in California.....Consequently, this action does not present the scenario that CAFA was intended to address; to wit, the litigation of a nationwide class action in a state court.” *Sample v. Big Lots Stores, Inc.*, 2010 U.S. LEXIS 131130 at *10-11. Following Judge Armstrong’s “very thorough analysis,” the Southern District recently remanded a PAGA action on the ground that it did not constitute a class action for purposes of removal under CAFA. *Zator v. Sprint/United Management Company*, 2011 U.S. Dist. LEXIS 33383, *12 (S.D. Cal. 2011.)

As explained above, the PAGA claim actually is a state police action brought against Defendant by Plaintiff as the alter ego or agent of the State of California. Thus, this case is not a typical action in which the district court would exercise supplemental jurisdiction under 28 U.S.C. § 1367. Section 1367 provides that “the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.” 28 U.S.C. § 1367.

The Tenth Amendment of the Constitution of the United States provides, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” A state’s police power has always been acknowledged as a right reserved to the state under the Tenth Amendment. *Raich v. Gonzales*, 500 F.3d 850, 866-67 (9th Cir. 2007). Indeed, the PAGA claim is a State police and revenue action. Thus, comity and federalism weigh heavily in favor of declining jurisdiction or abstaining.

1 Clearly, the State of California is entitled to have its statutory police actions
2 adjudicated by the state court.

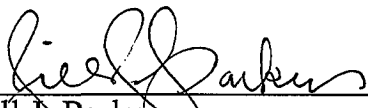
3 **V. CONCLUSION**

4 For the foregoing reasons, this lawsuit should be remanded back to
5 California state court. Not only does Defendant fail to meet its burden to prove
6 that the requisite amount in controversy for CAFA jurisdiction is met; this court
7 lacks jurisdiction over the PAGA claim. Thus, Plaintiff respectfully requests that
8 this Court exercise its discretion and remand this case under 28 U.S.C. § 1447(c).

9 Respectfully Submitted,

10 Dated: September 22, 2011

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11
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